EXHIBIT A

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

v. 06 CR 988(LTS)

GERALD SCOTT,

Defendant.

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New York, N.Y.
January 5, 2018
12:15 p.m.

Before:

HON. LAURA TAYLOR SWAIN,

District Judge

APPEARANCES

GEOFFREY S. BERMAN
Interim United States Attorney for the
Southern District of New York
CATHERINE E. GEDDES
Assistant United States Attorney

FEDERAL DEFENDERS OF NEW YORK
Attorneys for Defendant
JENNIFER E. WILLIS
MATTHEW B. LARSEN

(In open court; case called)

MS. GEDDES: Good afternoon, your Honor. Catherine Geddes for the United States.

THE COURT: Good afternoon, Ms. Geddes.

MS. WILLIS: Good afternoon, your Honor. Jennifer Willis, Federal Defenders of New York. Joining me at counsel table is Matt Larsen also with the Federal Defenders of New York.

THE COURT: Good morning, Ms. Willis, Mr. Larsen and Mr. Scott.

Mr. Scott, are members of your family in court today?

THE DEFENDANT: Yes.

THE COURT: Good morning to all of you.

We're here today for the adjourned resentencing of Mr. Scott, and for the reasons explained in the June 2nd, 2017 memorandum opinion order issued by this Court.

I have received and reviewed the presentence investigation report, which is dated January 11th, 2008, including the recommendation and addendum. I have also received and reviewed a December 11th, 2017 defense submission which was accompanied by four letters of support from family members and a former employer of Mr. Scott, a letter from Mr. Scott himself, a letter detailing a reentry plan and educational documentation. I have also reviewed a second letter dated December 8th, 2017 from Mr. Scott and defense

counsel's supplemental submission dated January 3rd, 2018.

I have reviewed the government's December 11th, 2017 submission as well as the government's December 27th, 2017 supplemental submission.

Are there any other written submissions that the parties are intending to consider in connection with the sentencing?

MS. GEDDES: No, your Honor.

MS. WILLIS: No, your Honor.

THE COURT: Thank you.

Ms. Geddes, would you make your statement regarding victim identification and notification.

MS. GEDDES: Yes, your Honor. Our victim impact office has notified the victims of the offense of today's proceeding.

THE COURT: Thank you.

Ms. Willis, have you read the presentence report and discussed it with Mr. Scott?

MS. WILLIS: I have, your Honor.

THE COURT: Mr. Scott, have you yourself reviewed the presentence report and discussed it with your attorney?

THE DEFENDANT: Yes, your Honor.

THE COURT: Ms. Willis, would you like to speak further to the career offender guidelines issue now?

MS. WILLIS: Your Honor, Attorney Larsen from my

office is prepared to address that portion of the argument.

THE COURT: Very good.

You're submission was second and so perhaps I should ask Ms. Geddes to lead off at this point.

MS. GEDDES: Yes, your Honor. I just wanted to address two points that were raised in the defendant's January 3rd submission. The first is that the defendant claims in their submission that assault requires an overt act and cannot be accomplished by omission; but that simply is not the case. It is well settled that failure to act can give rise to assault or manslaughter or murder of any of these charges just as action can if there is a duty to act and whatever requisite mental state is required. Here penal law and lawful penal code both include omission to perform acts as a basis for criminal liability.

THE COURT: Criminal liability for assault?

MS. GEDDES: Criminal liability in general. It is the general provisions of New York Penal Law 15.10 and Model Penal Code 2.01. They don't specifically mention omission in the assault or murder or those specific statutes, but the one I cited -- the ones I have cited are generally applicable to all of the statutes for all of the specific crimes.

THE COURT: And so the statute of the Model Penal Code provision say that any codified crime can be committed by omission?

MS. GEDDES: If there is a duty to act. If there is a legal duty, for example, in these cases the parents' legal duty to provide care for their children, in those cases the omission is just as much a part of the crime as an overt act as an affirmative act.

THE COURT: What were those citations again?

MS. GEDDES: It is New York Penal Law 15.10 and Model Penal Code 2.01.

THE COURT: Did you bring copies for the Court and defense counsel to look at? It seems to me back where I was -- well, not quite back where I was on December 22nd but uncomfortably close to where I was on December 22nd.

MS. GEDDES: I do not have copies of those, your Honor. I apologize.

THE COURT: You'll have to hold on while I look them up. Just as you should always come to court prepared with your copies of rules if you are going to be relying on specific cases or citations, you should be prepared to provide them to the Court and in advance to defense counsel, and preferably having received defense counsel's submission on schedule two days ago, which I spent a lot of time with, and I am sure that you did based on what you said now. If you had something else to add to the canon specific and not by way of argument of citations that you had already offered, you should have asked for permission to send a supplemental submission or just sent

these materials out.

Do you understand that?

MS. GEDDES: I do, your Honor.

THE COURT: Will you change your behavior in the future in this regard?

MS. GEDDES: Yes, your Honor.

THE COURT: Thank you.

You can have a seat for a moment and I will print them out so that Ms. Willis and Mr. Larsen will get them as well.

There are two documents, a one-page document and two-page document to go to each table.

THE DEPUTY CLERK: Okay.

THE COURT: You may proceed with your argument, Ms. Geddes.

MS. GEDDES: Thank you, your Honor.

Aside from the New York Penal Law and the Model Penal Code, which mention omissions as a basis for liability, the *Lafave* treatise that the parties both cited also notes -- that specifically notes that murder and manslaughter could be committed by omission when there is a duty to act and the Second Circuit --

THE COURT: Does it say anything about assault?

MS. GEDDES: The *Lafave* treaties section on battery mentions that it can be -- one of the elements it lists is acts or omission and it describes how a lot of statutes conflate

assault and battery.

I will just mention one second Circuit Case.

THE COURT: Let's get your list of citations.

MS. GEDDES: Sure.

THE COURT: So the section of *Lafave* treatise is what?

MS. GEDDES: 16.2 is the definition of battery that mentions act or omission, and 6.02 mentions that murder and manslaughter could be committed by omission to act when there is a duty and it mentions as an example that a parent who doesn't call a doctor for a sick child and says that that parent could be guilty of criminal homicide.

THE COURT: Next.

MS. GEDDES: The Circuit Case is *United States v. Sabhnani*, 599 F.3d 215 at page 237 from 2010 references a general principle -- the general principle that omissions may serve for the basis of criminal liability only if there is an affirmative duty to act. It is not otherwise relevant to these issues, but it is just an example of the Second Circuit recognizing that an omission just as much as an act can give rise to criminal liability when there is a duty as in the case of parents in the manslaughter case.

The defense doesn't cite any cases that disagree with these principles. The cases that they cite such as *Garcia*, *Jimenez* and *Cooper* are only addressing whether recklessness is sufficient for aggravated assault not whether an omission can

lead to aggravated assault. The Court uses the word "act" because most of these are committed by affirmative acts. It is not commenting on that it has to an affirmative act as opposed to omission. Similarly, in the *Perez* case it is just addressing whether creating a substantial danger of serious injuries is sufficient and finds that there has to be an actual injury or death. It also is not saying that there has to be an affirmative act and that an omission is not sufficient.

So while this force or act versus omission discussion is relevant to the earlier question in this case, which is whether manslaughter has as an element the use or attempted use or threatened use of physical force under the force clause, that is not a requirement of the enumerated felony clause. There is no requirement that it be use of force, just that the enumerated felony match here what we have as first degree manslaughter under New York law. This is recognized as well in the *Chrzanoski* case that this Court cited in its June 2nd opinion where the Court says, The intentional causation of injury does not necessarily involve the use of force. There is a distinction between causing injury, which can be done by omission versus the use of force, which in that case this Court had found first degree manslaughter does not involve use of force, but that does not answer the question whether it involves intentional causation of injury. In fact, the Chrzanoski case even mentions a doctor who deliberately

withholds vital medicine from a sick patient as an example of causing injury -- intentionally causing injury without the use of force.

The second point I wanted to make in response to the defendant's January 3rd letter is that they claim that manslaughter in New York punishes a parent's failure to protect his child, but that is not a complete reading of what the manslaughter statute punishes. The manslaughter statute punishes a parent who intends to cause a serious physical injury and then causes that injury. So that is different from the Tennessee statutes that are cited in the defendant's letter where there is no intent to cause injury. The intent to cause injury here fits under aggravated assault and takes it out of statutes like the ones in Tennessee.

I will also note that the defendant doesn't give any alternative generic definition of aggravated assault than the one that the government listed, which is from the Model Penal Code, and similar cases in the government's December 27th letter. Aggravated assault occurs when a defendant attempts to cause serious bodily injury or causes such injury purposefully or knowingly. And the manslaughter convictions required proof that the defendant intended to cause serious physical injury and then caused the death. So the New York first degree murder statute here does fit within the aggravated assault generic definition, and while in New York one way that manslaughter

could be accomplished is for a parent who harms a child. In the *Steinberg* case, as this Court mentions in its earlier ruling, the parent had beaten the child and then failed to seek medical care whether or not the parent is the one who applied violent force was the issue addressed in the earlier ruling, the parent by definition intends to cause serious physical injury and the child suffers physical injury or death which is generic aggravated assault.

So for those reasons the government submits that the defendant is classified as a career offender under 4B1.2.

THE COURT: Would it be helpful to defense counsel if I printed out the *Lafave* excerpts that were cited?

MR. LARSEN: No, thank you, your Honor. I can respond now.

Ms. Geddes' reference to the general principle of criminal liability that one can be held accountable for an omission is a point that we don't take issue with; but as Ms. Geddes herself recognizes, these are general principles of law. Our task here today is look at Mr. Scott's manslaughter offense and specifically compare it to the generic offenses of voluntary manslaughter, murder and aggravated assault.

Unless the Court prefers, I will go through the crimes in that order.

THE COURT: That will be fine.

MR. LARSEN: As set out in our December 11th letter,

your Honor, there are three differences between Mr. Scott's manslaughter offense and the generic offense of voluntary manslaughter. I will note preliminary that Ms. Geddes cited particular cases or particular statutes or a particular section of the penal code, but that is not the inroad where we're talking about generic offenses. The second Circuit reaffirmed this point in the *Jones* decision, which is in our brief and which cites the Supreme Court's decision in *Taylor*. The Court there says, The generic definition of a crime is the sense in which the term is now used in the criminal codes of most states.

So we look to what the majority rule is, what the general sense of the offense is and that is how we get the generic definition, and we then take a particular defendant's prior and compare it to that generic and see if it is a categorical match, if it matches in every way. If it is broader, it doesn't count. So starting again with the voluntary manslaughter offense, we identified three differences in our December 11th letter brief. Three differences between Mr. Scott's manslaughter offense and the generic offense of voluntary manslaughter.

We noted the differences first. Mr. Scott's manslaughter offense does not require any intent to kill. Secondly, there is no heat of passion requirement. And finally, it cannot be committed by omission, generic or

voluntary manslaughter. Now, your Honor, Ms. Geddes is absolutely right that sometimes manslaughter can be committed by omission and again as we note in our December 11th letter, manslaughter by omission is generic involuntary manslaughter and the Commission has now removed that as an offense that could make someone a career offender. We identified the three differences.

Significantly, the government has not taken issue with any of those three differences. Coaching basis to reject the three differences we address this in the letter of the third of January.

Moving on to murder, your Honor. Again, this is set out in our papers of January 3rd; but in essence the generic definition of murder, at least as described by the Third Circuit, is either intentional killing and we know that doesn't fit Mr. Scott's offense because there is no requirement of intent to kill. Or it is another type is felony murder, but we also know from *Lafave* and the other authorities that manslaughter does not count as a felony for the felony murder doctrine. If it did, then every manslaughter would be a murder but we know there is a difference between those two crimes. Again, these authorities are set out in our papers.

Finally, there is depraved indifference murder. This is where you show such an utter disregard for whether your victim lives or dies, you will be deemed under the generic

definition of murder to have committed a murder. Again, that is not Mr. Scott's prior offense. We have set out the authorities under New York law showing that there is an intent requirement of serious injury and that intent requirement is fouled, but it does not rise categorically to a level of having utter disregard for whether the victim lives or dies. We have cited the cases where an individual can punch someone else, knock out teeth, break an arm or even bite them on the nose and the New York courts say that is enough for serious injury. But biting someone on the nose or even breaking an arm or giving a karate chop as another case shows does not rise to the level of utter disregard for whether the victim lives or dies. It is therefore compared to generic depraved indifference murder overbroad and cannot count under the categorical approach.

Finally, the government again missing the point of what the generic analysis requires, the government hones in on the federal murder statute, 1111, and says, Well, there is authority showing that you can commit murder under that particular federal statute if you simply have an intent to serious injure. Again, your Honor, one standalone statute does not necessarily represent generic murder.

As again we have shown in our authorities, which again the government has not disputed, most states today do not count intent to injure murder as qualifying as murder. They punish it as something else. So the federal statute although it may

encompass intent to injure murder, does not count as generic murder because again we're comparing Mr. Scott prior to the generic definition of murder. All of this is set out in our brief. I am just reiterating it now for the Court's convenience.

The final point, your Honor, is aggravated assault. Now, again, I tried to make this as easy as possible because I recognize this is an extremely complicated area of law. All of these categorical requirements trying to figure out what the generic offense is, it is complicated. I should note at this point because it is complicated and we have a lot of clarity on these questions, the rule of levity does come into play. The Second Circuit has not defined generic voluntary manslaughter, murder or aggravated assault. So if the Court finds that there is doubt here as to what those generic offenses entail, the rule of levity says that that doubt has to be resolved in Mr. Scott's favor, and we cite the Second Circuit case supporting that point. We were doing a guidelines analysis. If there is lack of clarity, levity comes into place, but we submit we don't have to get as far as levity because it is clear from the authorities that we cited, and the government hasn't disputed, that the generic definitions of these crimes do not match up with Mr. Scott's manslaughter prior as to aggravated assault.

The government has nothing to say to the authority

showing that assault as commonly understood by its nature requires proof of the use, attempted use or threatened use of contact against another person. Assault requires an overt act. I am not saying that no state punishes an assault by omission, but we're not looking here to find what one state may do in the minority. We're looking at what the generic offense entails, and the generic offense as reflected by the codes of most jurisdictions in this country is that the assault requires an act.

I was thinking back to my own first year of courts class, assault is the apprehension or touching or apprehension of touching. There has to be some kind of contact. Generic assault simply cannot be committed by omission. So when considering what aggravated assault entails, we know there has to be an assault because an aggravated assault is simply an assault made worse by serious injury or the use of a deadly weapon, but the baseline requirement is that there be an assault. The generic definition of an assault is an offense that requires action. Mr. Scott's prior differs from that because it can be committed by omission.

That is the point we're making, your Honor. It is not a categorical match when looking to the generic offense. Sure, some states may in the minority define assault as omission; but we're not looking to find in all 50 jurisdictions if there is one strange minority definition that lines up with what the

government has to say. We look to the generic definition. I put all these authorities in our brief showing that the generic definition assault requires action. The Six Circuit case is as close as we can get to this particular case. Because again the Sixth Circuit case is looking at a crime, essentially child abuse, that can be committed by omission; and the Sixth Circuit in *Cooper* said that is not a match with generic aggravated assault. You cannot commit the generic version of this crime by doing nothing. So it is not a matchup.

Your Honor, we explained how none of the offenses the government has in the past and now tried to offer as categorically fitting Mr. Scott's prior matches up. They are not categorical matches. We have shown the authorities supporting our position. The government really has nothing to say to dispute those authorities. It only offers general points of criminal liability, which are not relevant here. The question is specifically does Mr. Scott's manslaughter offense categorically, meaning in every situation, match up with the generic crimes here, and the answer is no because it is not a match to any of these offenses. He is not a career offender. His range is 120 to 131 months. He has already over-served that term. And for all the reasons we explained in our prior submission, we ask the Court to impose a sentence of time-served.

THE COURT: Thank you.

Anything further, Ms. Geddes?

MS. GEDDES: Your Honor, Mr. Larsen has argued that most state statutes require an overt act for aggravated assault, but the only cases cited in the brief -- he hasn't mentioned any new ones here today -- do not address that issue. They just address both mental states whether recklessness enough where as the government has cited not just one state statute but the Model Penal Code treatise Second Circuit statement that is a general principle that omissions when there is a legal duty in those specific instances can give rise to the crimes just as an overt act can.

So the government believes that at the very least this New York first degree manslaughter clearly falls under the generic aggravated assault. There is no reason to believe that assault is different from murder or manslaughter, which can be committed by omission or that it is different than battery which can be committed by omission and the defendant hasn't cited any cases that show that.

THE COURT: Thank you.

I am going to make my ruling on this issue now.

I have considered thoroughly arguments made and makes the following findings:

Mr. Scott's sentence was originally computed under guidelines that included the residual clause in the career offender provisions. Although in *Beckles* the Supreme Court

concluded that application of the residual clause of that guideline did not raise constitutional issues, the Sentencing Commission has removed that provision going forward as a matter of policy, and Section 1B1.11 of the guidelines requires Mr. Scott's new sentence must be calculated by reference to the current guidelines, which no longer include the residual clause of the career offender guideline.

The determination of the applicability of the career offender guideline enhancements must therefore be based on whether Mr. Scott's prior New York state convictions for first-degree manslaughter under N.Y. Penal Law, Section 125.20(1) qualify as predicate "crimes of violence" that, with the Title 18, U.S.C., Section 924(c) conviction for which he is being resentenced today, place him in the career offender category under the current version of the guidelines.

Under the Second Circuit's decision in *United States v. Jones*, 2017 WL 4456719 (2d Cir. Oct. 5, 2017), when a state statute is "divisible," the Court must employ a modified categorical approach to determine whether a state conviction qualifies as a predicate offense for a federal sentence enhancement. If the state statute criminalizes any conduct that would not fall within the scope of the relevant Guidelines provision, a conviction under the state statute is not categorically a crime of violence and cannot serve as a predicate offense.

The Court finds that N.Y. Penal Law, Section 125.20 is "divisible." See *Vargas-Sarmiento v. U.S. Dep't of Justice*, 448 F.3d 159, 167 (2d Cir. 2006).

According to the Certificates of Disposition proffered by the Government in connection with Defendant's earlier motion to vacate, Mr. Scott was convicted under subsection one of N.Y. Penal Law, Section 125.20. Thus, the Court's analysis focuses on subsection one of N.Y. Penal Law, Section 125.20, because the Court "must presume that the conviction rested upon nothing more than the least of the acts criminalized." *Moncrieffe v. Holder*, 133 S.Ct. 1678, 1684 (2013).

The Court has already determined in its June 2, 2017 ruling vacating Mr. Scott's sentence under the Armed Career Criminal Act, and that ruling is at Docket Entry 82, that Mr. Scott's prior convictions are not "crimes of violence" within the meaning of the force clause of the Armed Career Criminal Act. The ACCA's force clause is identical to the force clause defining a crime of violence in current guideline section 4B1.2(a)(1). Therefore, the prior manslaughter convictions do not fit the guideline's force clause and thus cannot serve as a predicate offense for a federal sentence enhancement under that clause. That is not controversial here but I am just stating that for the record.

The remaining relevant provision of the current career offender guideline, which is 4B1.2(a)(2), lists, among other

enumerated offenses, "voluntary manslaughter," "murder," and "aggravated assault" as qualifying crimes of violence. Accordingly, the question for resolution today is whether first-degree manslaughter, as defined by N.Y. Penal Law § 125.20(1) is either "voluntary manslaughter," "murder," or "aggravated assault" within the meaning of the guideline.

N.Y. Penal Law § 125.20(1) provides that a person is guilty of manslaughter in the first degree when "with intent to cause serious physical injury to another person, he causes the death of such person or of a third person." A "serious physical injury" is defined under New York law as a "physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ." N.Y. Penal Law Section 10.00(10).

As the Second Circuit held in Jones, when the basis for categorizing a prior conviction as a crime of violence is that the offense is specifically enumerated as such in the Career Offender Guideline, the Court compares the state statute to the generic definition of the offense. *Jones*, 2017 WL 4456719, at *6. The "generic" definition of a crime is the sense in which the term is now used in the criminal codes of most states.

I turn first turns to the Government's argument that

subsection 1 of New York's first-degree manslaughter statute fits within the generic definition of "voluntary manslaughter." Amendment 798 to the guidelines revised the definition of "crimes of violence" to exclude involuntary manslaughter and only focus on voluntary manslaughter. Therefore, the Court looks to the general understanding of the elements of voluntary manslaughter to define that term as used in the guidelines.

Voluntary manslaughter is commonly understood to consist of intentional killing under the heat of passion or similar provocation that mitigates but does not excuse killing. See *LaFave*, 2 Substantive Criminal Law Section 15.2 (2d ed.), which notes that in most jurisdictions, voluntary manslaughter is defined as "an intentional homicide committed under extenuating circumstances which mitigate, though they do not justify or excuse, the killing"). See also 40 Am. Jur. 2d Homicide § 48 (defining voluntary manslaughter as "a killing committed in a sudden transport of passion or heat of blood, upon reasonable provocation and without malice, or upon sudden combat") and also Leonard B. Sand et al., Modern Federal Jury Instructions paragraph 41.02, at 41-39 (1995) listing as elements of voluntary manslaughter that the "defendant killed the victim in a sudden quarrel or the heat of passion").

New York's first-degree manslaughter statute clearly criminalizes conduct that falls outside of the scope of the generic definition of voluntary manslaughter. New York's

first-degree manslaughter statute does not require an intent to kill, only to cause serious physical injury. And, as noted in the Court's June 2, 2017, decision, it can be committed through omission. See *People v. Steinberg*, 79 N.Y.2d 673 (1992) (finding that a parent's failure to fulfill a non-delegable duty to provide his child with medical care, which is an omission, can support a charge of first-degree manslaughter, as long as there is sufficient proof that the defendant intended to cause serious physical injury). See also 6 N.Y. Prac., Criminal Law § 6:11 (4th ed.), which notes that "first degree manslaughter generally applies to situations in which the defendant intends to seriously harm, although not to kill, the victim").

The Court is not persuaded that first-degree manslaughter is nonetheless a crime of violence by Judge Woods' oral decision in *United States v. Castillo*, 16 Cr. 249. The sentencing Transcript is dated Oct. 6, 2016. Judge Woods was not presented with the question of whether subsection 1 of New York's first-degree manslaughter statute fits within the generic definition of "voluntary manslaughter" as enumerated in § 4B1.2(a)(2) of the November 1, 2016 Guidelines, which are applicable to Mr. Scott's sentencing today. Judge Woods' inapposite and unelaborated comment that first-degree manslaughter "clearly constitutes a crime a violence" under the August 1, 2016 supplement to the Sentencing Guidelines, is not

persuasive when compared with the fruits of this Court's more extensive analysis.

The Court also respectfully disagrees with Judge Carter's determination in *United States v. Artis*, 15 Cr. 865, the sentencing Transcript of Apr. 21, 2017, that first-degree manslaughter is a crime of violence under the Guidelines. Judge Carter's decision is also unelaborated and unexplained, and is ambiguous as to the legal theory Judge Carter ultimately relied upon. Again, it is not persuasive in light of this Court's more fulsome analysis.

The Court likewise does not find the only case cited by the Government in support of its position to be persuasive. That case was submitted in the original submission. That case did not address the distinction between subsections 1 and 2 of N.Y. Penal Law Section 125.20 or otherwise parse the particulars of either the New York statute or the generic meaning of voluntary manslaughter. See In re Wells' Will, 350 N.Y.S.2d 114, 117 (Surrogate's Court 1973). And the proffer here of a New York statute and Model Penal Code provision that indicate that minimal requirements for criminal liability can under those provisions include acts of omission is also insufficient to persuade the Court that voluntary manslaughter, indeed any of the crimes that I am going to discuss, can categorically be committed by omission under the general definitions of those crimes, but I will go on further

explanation here.

So the Court concludes that subsection 1 of New York's first-degree manslaughter statute 125.20(1) is broader than the generic definition of voluntary manslaughter because it can support a conviction for conduct outside of the traditional scope of voluntary manslaughter. First degree manslaughter therefore does not qualify as a crime of violence by virtue of being "voluntary manslaughter" within the meaning of the career offender guideline.

I turn next to the Government's argument that subsection 1 of New York's first-degree manslaughter statute fits within the generic definition of "murder." The Court acknowledges that the Second Circuit has not yet directly addressed the generic definition of murder as listed in the current career offender Guidelines, and the Court thus looks to the Third Circuit's definition of murder in *United States v. Marrero*, 743 F.3d 389 (3d Cir. 2016). In *Marrero*, the Third Circuit held that "murder is generically defined as causing the death of another person either intentionally, during the commission of a dangerous felony, or through conduct evincing reckless and depraved indifference to serious dangers posed to human life."

The Court finds that subsection 1 of New York's first-degree manslaughter statute clearly criminalizes conduct that falls outside of the scope of the generic definition of

murder. First, subsection 1 does not require an intent to kill, and thus does not require "causing the death of another person intentionally." Second, first-degree manslaughter cannot be a predicate felony for felony murder, see *LaFave* Substantive Criminal Law Section 14.5, and thus subsection 1 criminalizes conduct outside of death caused during the commission of a dangerous felony. Third, the intent to cause serious bodily injury required by subsection 1 encompasses conduct that does not necessarily require the defendant to demonstrate recklessness or a depraved indifference to human life.

For example, New York courts have found that a defendant intended to cause a serious physical injury in cases where the defendant bit another's nose causing a scar, where the defendant caused the loss of four front teeth, and where the defendant caused a broken arm. See *People v. Felice*, 45 A.D.3d 1142 (App. Div. 2007); *People v. Everett*, 110 A.D.3d 575 (App. Div. 2013); and *People v. Mohammed*, 162 A.D.2d 367 (App. Div. 1990). These decisions demonstrate that an intent to cause serious physical injury does not categorically constitute an utter disregard for the value of human life. Therefore, subsection 1 of New York's first-degree manslaughter statute is broader than the portion of the generic definition of murder that criminalizes death caused through conduct evincing reckless and depraved indifference to serious dangers posed to

human life.

The Court does not find the Government's citation of *United States v. Gonzalez*, 399 F. App'x 641 (2d Cir. 2010), and *United States v. Regnier*, 44 F. App'x 524 (2d Cir. 2002) persuasive in its analysis of the generic definition of murder. Neither *Regnier* nor *Gonzalez* undertook an analysis of the generic definition of murder or attempted to determine the sense in which that term is now used in the criminal codes of most states. Each of those cases construes federal murder statutes, and finds that the requisite malice required to prove murder can be satisfied when a defendant intends to cause serious bodily harm. However, as one treatise acknowledges, "most modern codes define murder as not including the intent-to-do-serious-bodily-injury type." *LaFave* Substantive Criminal Law Section 14.3. This treatise observes at note 4 that Section 210.2 of the Model Penal Code - which the Third Circuit relies upon in formulating the generic definition of murder in *Marrero* - was revised to delete the intent to injure as an independent ground for culpability "on the judgment that it is preferable to handle such cases under the standards of extreme recklessness and recklessness contained in the murder and manslaughter provisions, respectively." That last clause was a paraphrase on my part.

The Court therefore concludes that Subsection 1 of New York's first-degree manslaughter statute 125.20(1) is broader

than the generic definition of murder and thus is not a "crime of violence" under the career offender guideline by reason of qualifying as "murder."

Finally, the Court turns to the Government's argument that subsection 1 of New York's first-degree manslaughter statute fits within the generic definition of "aggravated assault."

The Court acknowledges that the Second Circuit has not yet directly addressed the generic definition of aggravated assault as listed in the current career offender guidelines, and thus looks to the generic definition adopted by the Sixth Circuit and several other circuits, which closely tracks the Model Penal Code. See *Moring v. United States*, No. 16-5463, 2017 WL 4574491, at *3 (6th Cir. June 8, 2017); Model Penal Code, Section 211.1(2). Model Penal Code Section 211.1(2) provides that a person is guilty of aggravated assault if he: "(a) attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life; or (b) attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon." Aggravated assault is necessarily a form of the broader crime of assault, and so the Court must consider the elements of the generic crime of assault.

Quoting from 6 Am. Jur. 2d Assault and Battery Section

22, "Assault requires, in addition to intent, an overt act or an attempt, or the unequivocal appearance of an attempt, with force and violence, to do physical injury to the person of another." Although direct force against the victim is not required, assault -- and therefore aggravated assault-requires some affirmative act by the defendant. See 6A C.J.S. Assault Section 79. Again I quote "Ordinarily, an overt act is an essential element of an assault, and mere preparation or a threat to commit and assault unaccompanied by physical effort to do so, does not amount to an assault."

Because New York's first-degree manslaughter crime can be committed through omission, see *People v. Steinberg*, 79 N.Y.2d 673 (1992), it criminalizes conduct outside the scope of the generic definition of assault, and therefore aggravated assault. See also *United States v. Cooper*, 739 F.3d 873, 880 (6th Cir. 2014) which finds that a state statute which criminalized a parent's failure to prevent an aggravated assault against his or her child "encompasses more conduct than generic aggravated assault."

Thus, after considering each of the Government's arguments, the Court concludes that the Guidelines' Career Offender enhancement is inapplicable here. The Court finds that Mr. Scott's base offense level is 20, that his total offense level is 17, and that his criminal history category is IV. This yields an advisory range of 37-46 months, which when

added to the 84-month term mandated by Mr. Scott's Section 924(c) conviction produces a total range of 121-130 months.

Now, I need to go back to a couple of housekeeping issues.

Ms. Geddes, in Footnote 6 to your December 11th submission you cited paragraph 71 of the PSR as computing the noncareer offender guideline as 29 with a criminal history category of six for a guidelines of 924(c) of 151 to 188. It seems by my reading of the PSR that that paragraph's computations are based on the 4B1.1 career offender guidelines computation that is in paragraphs 27 to 30 of that report and that paragraph 71 also reflects an incorrect noncareer offender criminal history category computation of six. Paragraph 46 of the PSR puts the noncareer offender criminal history category computation at four.

So it seemed to me as I said a few minutes ago that based on paragraphs 19 to 26 of the PSR and paragraph 46, the defense is correct in concluding that the correct noncareer offender guideline for 924(c) would be 17 with criminal history category four. And so if I've misread PSR, let me know.

MS. GEDDES: No, your Honor. I agree with that calculation. My footnote is that that paragraph of the PSR

we're referencing was within the career offender guideline. There was subsection C, which sort of has enhanced career offender guidelines for someone who is also convicted of 924(c). So that is what that calculation was based on your Honor's ruling that he is not under the career offender guideline at all, then I agree with the calculations you have just set forth.

THE COURT: Thank you.

Is the government applying to have Mr. Scott credited with the third point for acceptance of responsibility?

MS. GEDDES: Yes, your Honor.

THE COURT: That application is granted and that gets us to the net figure of 17.

Did either side have any further issues or objections with respect to the PSR?

MS. GEDDES: None from the government.

MS. WILLIS: No, your Honor.

THE COURT: So I will direct that the PSR be amended to delete the career offender enhancement calculations in paragraphs 27 through 30 and to reflect in paragraph 31 that the total offense level is 17. I will also direct that the second sentence of paragraph 46 be deleted and that the reference to Mr. Scott's criminal history category in that paragraph be amended to be Roman four and I will direct that the second and third sentence of paragraph 45 be deleted

because the guidelines Section 4A1.1(e) that is referenced in that paragraph was stricken by Amendment 742 to the guidelines effective November 1st, 2010, and the total number of criminal history points in paragraph 46 will therefore be amended to seven.

I am now ready to hear general sentencing argumentation.

Ms. Willis, would you start?

MS. WILLIS: Thank you, your Honor.

Your Honor, as I wrote in our submission, I believe this Court is in a unique position with respect to Mr. Scott. Typically when there is a sentencing hearing, the Court applies educated guesswork to try to determine how much punishment is sufficient but not greater than necessary to achieve the sentencing objectives. The Court uses all of its resources and to come one a number and hopes that number is enough.

Here we have a situation where the Court has more information than you would normally have. We have a passage of time and we have seen and the Court is able to see the effect of the passage of time has brought on Mr. Scott as someone who now stands before you having served 11 years and two months and five days of his sentence. I think that his behavior in the last 11 years is particularly informative because choices and decisions that he made, he made without any thought that it would be reviewed later. This is not a situation where he was

serving a state sentence and thought perhaps he might be up for parole and so takes classes or is doing courses or working might somehow positively reflect on him and allow him to lessen his sentence. He fully expected that he would be serving the entirety of his 22 years and despite that he made positive decisions. He wanted to move forward. He wanted to learn from his mistakes and not repeat them.

So you have before you someone who is older, wiser than he was 11 years ago. Mr. Scott fully appreciates the wrongs of his actions. He wrote about that in his letter, which is an exhibit to the Court. He also has reflected in a way that he hadn't not just on this case but the choices that he has made and what it has meant to his life, to his family life.

I do want to pause for a moment and point out the family members who are here today to support Mr. Scott. His sister, who was here two weeks ago and offered Exhibit A, the submission, the letter in support; his brother Kenneth is sitting on the end; his niece, India, who was also here two weeks ago; and his nephew Darius.

THE COURT: Thank you all for being here and thank you for the letters that I received.

MS. WILLIS: So Mr. Scott is someone who by nature of in part his age reflecting back on his life, he sees that now he is someone who is 52 years old and that he has squandered

the better part of his life through his choices. He now has a perspective that age and wisdom provides to realize that even if he is blessed with a long life, more of it has passed than what he likely has in front of him.

So he is committed to not repeating the mistakes of the past and I think that we also have that we did not have 11 years ago is that Mr. Scott has a detailed reentry plan. When he left prison after his last state sentence, he had mental health issues that were not addressed. He had a substance abuse issue, which had not been quelled by his time incarcerated in the state. He was able to get ready access to narcotics and left prison with his addiction fully in fact and without any supportive services.

Now Mr. Scott has years of medication and of treatment. And through the reentry plan and the social worker, who has been working with Mr. Scott and is also here to support him today, through working together they have come up with a comprehensive plan so that when Mr. Scott is released, he has a place to go to. He will be able to live with his sister Kathy.

He has mental health services that he will be able to engage with. They have taken the steps to secure health insurance for him so he will be able to pay for those services. He will have the supportive services of the Federal Defenders social work office. We continue to work with clients after they are released. He would have obviously supervision through

federal probation which is obviously more comprehensive and more focused on ensuring success than traditional patrol would be.

Having those things in place puts him in a completely different position he was in when he emerged from prison on his last state sentence. He has those things in place. He has family to support him. Again, what I think is crucial is that he has transformed mentally. He has used these 11 years to reflect on his choices, on his life and he is committed to not wasting anymore time, to not making anymore decisions that would put him in jeopardy of going back to the penitentiary.

He realizes that at 52 if he were to be imprisoned again that is virtually the end of his life. He has come up with things that he wants to accomplish and he understands that maintaining mental health, maintaining his sobriety that those things are crucial to the things that he wants to accomplish. So having that commitment and having the support and having the things in place to assist him with that commitment let's us know that the aims of punishment have been accomplished. He has served a sentence which is above his guidelines range, several months above what the guidelines recommend taking into account is criminal history and taking into account conduct which is obviously serious. He has served more than that sentence. So the punishment is one that is an appropriate punishment for the crime.

He has been deterred. The passage of time, the effect, he speaks to the Court about the loss of various family members. He is extremely fortunate to have the support of family that year after year they have written to him and supported him. They left their jobs and come here to show you that support. He is fortunate in that respect. He has also lost family, family members who died while he was incarcerated and as he writes in his letter being unable to spend those last moments with them, being able to say good bye to them, being able to go to their funeral, being able to go to the gravesite. That is something that has changed him. Understanding what his choices have done to him and to his family is something that he has affected him greatly. So he has been deterred.

Lastly we'll talk about rehabilitation. He has demonstrated through his primarily good conduct while he was in the Bureau of Prisons through taking courses, through working, through engaging in mental health treatment. The continuation of his rehabilitation would be better accomplished in the community connecting him with the mental health sources that we have cited in the reentry plan, connecting him with the vocational services that we have cited in the reentry plan, a way to continue his rehabilitation and to allow him to be released and to engage those supportive services that we have laid out.

So in sum, your Honor -- I don't want to belabor what

I know you have already read in the submission -- he has been punished and he has been deterred and he has been rehabilitated. He has served above a guideline sentence and his sentence of time-served is the just and appropriate one and that is what I would ask you to sentence Mr. Scott to.

THE COURT: Thank you, Ms. Willis.

Ms. Geddes.

MS. GEDDES: Your Honor, the government rests on its prior submission.

THE COURT: Thank you.

Mr. Scott, would you like to say anything on your own behalf before I decide on your sentence?

THE DEFENDANT: Well, your Honor, as you know from my past, I always speak at the sentencing hearing.

THE COURT: I am sorry?

THE DEFENDANT: I always speak. Yes, I do.

THE COURT: I have been looking forward to hearing from you. I am going to ask you to speak up a little bit more and pull that microphone a little bit closer to you so we hear every word.

THE DEFENDANT: I have a lot to say, but I am not going to say. On advice of counsel, I am going keep it brief. There is so much I would like to say of course. What I want to most importantly express is my regret for a crime I committed 11 years ago. I am sorry for that. Despite being on drugs

that day, there was no excuse for what I did. If I wasn't on drugs that day, I would have never committed that crime. I am pissed, ashamed of it myself to this day, but I am sorry for that.

I am not the same man I was 11 years ago. I would like to have a chance to start a new life, make a better life for myself. I am not going to go much further. I am not going to use this as a forum to advocate for a prison reform. I will leave it at that.

THE COURT: Thank you, Mr. Scott. It is good to hear from you and I was glad to receive the two letters that you prepared for me and I read beforehand.

THE DEFENDANT: Yes, I didn't know -- I thought it was private actually what I wrote. I didn't know --

THE COURT: Anything that you send to me isn't private. Anything the Court considers has to be shared.

THE DEFENDANT: I was told that, yes.

THE COURT: There is nothing in that letter to be ashamed of.

THE DEFENDANT: Thank you.

THE COURT: Thank you. Please be seated.

I have read very carefully everything that was submitted to me before today and I have listened very carefully to everything that has been said here today. I adopt the factual recitations set forth in the presentence report with

the guideline analysis amendments that I detailed on the record.

The Court has discretion taking into account the applicable statutory provision in exercising its power under Section 3553(a) of Title 18 to determine the particular sentence to be imposed in each particular case. Section 3553(a) requires the Court to consider a number of specific factors and sentencing goals. These includes the nature and circumstances of the offense and the defendant's history and characteristics, the need for the sentence imposed to reflect the seriousness of the offense, promote respect for the law, and provide just punishment, deterrence, protection of the public, and provision of needed training or care or treatment to the defendant in the most effective manner. The Court also considers the types of sentences that are available and the applicable provisions of the guidelines as well as the need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct. The Court also considers where appropriate the need to provide restitution to victims, but that is not an issue here.

The law requires the Court to impose -- actually, let me confirm that since I didn't ask you that on the way along.

Ms. Geddes, what is the government's position as to restitution and forfeiture?

MS. GEDDES: The government is not seeking either,

your Honor.

THE COURT: Thank you.

The law requires the Court to impose a sentence that is sufficient but not greater than necessary to comply with these sentencing purposes. As to the sentencing guidelines as explained earlier, I conclude that the applicable guideline offense level is 17 based on the revised computations that I went over in detail earlier and that the applicable criminal history category is four.

The Court also adopts the grouping of charges analysis as set forth in the presentence report. Accordingly, the advisory guideline range for custodial sentence including the mandatory 84-month component related to the 924(c) conviction is 121 to 130 months of imprisonment. I have used the November 1, 2016 edition of the guidelines manual in making these determinations.

I find no grounds for a departure from this guideline range and I have also considered carefully all of the requisite statutory sentencing factors of Section 3553(a) and all of the facts that have been put before me in light of those factors including the fact that Mr. Scott has been in custody since September 26th, 2006 for a total of approximately 134 months, a time period that exceeds the applicable guidelines range.

I will address briefly the 3553(a) factors. As to the nature and circumstances of the offense, this was a very

serious offense. Mr. Scott and another individual robbed three employees of jewelry store at gunpoint. Mr. Scott pointed the gun at the store owner. It was fortuitous that no one was injured during the robbery. Either Mr. Scott forced his codefendant to participate or he lied under oath about having done so in connection with the first round of the plea and the first round of sentencing and so altogether the circumstances are most serious and are not ones that Mr. Scott should be proud of and I hear from him today and see in his letter that he is remorseful and there are ones that require serious punishment and deterrence.

As to Mr. Scott's own history and characteristics, he had a difficult and troubled childhood and has the history of mental illness and drug addiction which were left untreated for many years including while he was incarcerated in the state prison system. I note that he had been working hard over the last 11 years to overcome his addiction and mental health problems and to reestablish his ties with his family and success of his efforts with respect to his family as shown here in court today and in the letters that I received and by all accounts he has lived a clean life and were to reinforce his separation from his addiction while he has been in federal prison.

He has completed numerous educational programs and maintained a record without serious adverse incidents while in

BOP custody. He has maintained a close relationship with his younger sister and niece, who both describe him as hard-working, caring, and devoted to his family. His family have demonstrated a strong commitment to helping him after he is released. I believe that his remorse is sincere and his letters indicate insight and positive realistic future goals.

He does have a history of violent offenses. In the past he has stabbed a person and shot another person to death. Those crimes were committed 30 years ago, though. He represents that he was using drugs when he committed the crime for which he is being sentenced today. He is now 52 years old and Mr. Scott exhibits significant changes in thinking, attitude and behavior. I also note that studies confirm that the recidivism risk diminishes significantly after the age of 50.

As I say, turning to this specific goals of sentencing, it is significant that Mr. Scott has demonstrated genuine remorse for his choices and acknowledges the pain that his actions have caused the victims of the robbery and his family and that he has been himself made even more acutely aware of the loss of time caused by his choices through the loss of several family members including his father while he has been incarcerated.

He demonstrates that he understands his actions deprived him of a normal life and he made the commendable

decision to spend his time within the Bureau of Prisons in a productive way including by developing a trivia game that is used by others and by taking classes in various skills. His reflections now are made with the benefit of several years of sobriety and mental health treatment. He acknowledges the need for ongoing treatment and he collaborated constructively with the Federal Defenders' social worker to develop a plan for housing and employment after his release.

So having considered all of these factors including the nature and seriousness of the crimes, Mr. Scott's own criminal history, his personal characteristics and his work over the last 11 years to overcome serious issues in his life, the Court finds that the guideline range included, which has now been exceed, a sentence that is reasonable, appropriate and no greater than necessary to satisfy the statutory purposes of sentencing. So I will now state the sentence that I intend to impose.

Mr. Scott, would you please stand as well as Ms. Willis and Mr. Larsen.

Mr. Scott, it is the judgment of this Court that you are to be sentenced to time-served on each of your counts of conviction to be followed by five years of supervised release of on each count to run concurrently. The total sentence as to custody is time-served total supervised release term is five years, which will give you a supervision, support and

accountability as you start your new life in community and cement the foundations for a lawful constructive life going forward.

The standard conditions of supervision 1 through 13 as detailed in the sentencing guidelines manual will apply. These will be written out specifically in the judgment that I sign and the Probation Department will explain them to you specifically as well. I am sure that your lawyers will have something to say to you about them.

You'll also be subject to the following mandatory conditions. You not commit another federal, state or local crime. You must not illegally possess a controlled substance. You must not possess a firearm or destructive device. I will suspend the normal mandatory drug testing condition because I will impose a special condition requiring drug treatment and testing. You must cooperate in the collection of DNA as directed by the authorities.

You must meet the following special conditions: You must participate in an outpatient substance abuse treatment program approved by the Probation Office. This program may include testing to determine whether you have reverted to the use of drugs or alcohol. The Court authorizes the release of available drug treatment evaluations and reports including the presentence report to the substance abuse treatment provider as directed by the Probation officer. You'll be required to

contribute to the cost of the services rendered in the form of a copayment in an amount determined by the Probation officer based on your ability to pay or the availability of third-party payment.

You must participate in an outpatient mental health treatment program approved by the Probation Office. You must continue to take any prescribed medications unless otherwise instructed by the healthcare provider. You must contribute to the cost of the services rendered that are not covered by third-party payment if you have the ability to pay. And, again, this is something you'll work through with your Probation officer.

The Court authorizes the release of available psychological and psychiatric evaluations and reports including the presentence report to the healthcare provider. You must submit your person, your residence, your place of business, your vehicle, and any property, computers, electronic communications, data storage devices and/or other media under your control to a search on the basis that the Probation officer has reasonable suspicion that contraband or evidence of a violation of the conditions of release may be found. Any search must be conducted at a reasonable time and in a reasonable manner. Failing to submit to a search may be grounds for revocation of supervised release. You must inform any other residence that the premises may be subject to search

pursuant to this condition.

You must report to the nearest Probation Office within 72 hours of release from custody. I am hopeful you will be released this afternoon and in time to go to the Probation Department. Officer Calderon of the Probation Department is here in court today and she will also be able to speak with the social worker about the plans that you devised and also with your family. I hope this is how this will all work.

You'll be supervised by your district of residence.

I will order you to pay a fine in the amount of $325. I understand that you have paid $325 already. The payments that you have made toward previously imposed fine to date will be applied to the payment of the $325 fine.

I will also order that you pay to the United States the mandatory special assessment of $300, which is $100 for each of your three counts of conviction. I understand that you have paid that as well and the payments that you made in the past will be credited to this $300 special assessment.

I believe that this sentence as a whole is reasonable, appropriate, sufficient and know greater than necessary to satisfy the statutory purposes of sentencing, which include punishment and deterrence. I also must note that you have to inform the Probation Department of any change in your financial circumstances.

Does either counsel know of any legal reason why the

sentence should not be imposed as stated?

MS. GEDDES: No, your Honor.

MS. WILLIS: No, your Honor.

THE COURT: The sentence as stated is imposed.

I must say something important to you to appeal rights. To the extent you have not given up your right to appeal through your guilty plea, you have the right to appeal this sentence. If you are unable to pay the cost of an appeal, you may apply for leave to appeal in forma pauperis. At your request, the Clerk of Court will file a notice of appeal for you. Any notice of appeal must be filed within 14 days of the judgment of conviction. So be sure to touch base with your attorneys as well. The deadline is short.

Ms. Geddes, are there remaining and counts or underlying indictments that need to be addressed?

MS. GEDDES: I would imagine they would have been dismissed the last time, but in abundance of caution we move to dismiss any open counts.

THE COURT: Since I vacated the prior sentence and judgment I think I need to reflect it again here. That application is granted.

I would like to say a few more words to Mr. Scott and his family. I thank you all in advance for listening. This has been a long road. Not as long a road as it could have been and that is a very good thing. You have shown in the 11 years

that you served that you do want to be a different person and you want to live as a different person. The changes in the law have given you the opportunity to move on those intentions in the world 10 years earlier than you would have otherwise been able to do, and I am glad to have been able to reach this result today.

I urge you for the rest of your days to recognize that every single thing you do is a choice and every choice that you make has consequences. So think in advance of your actions about their potential consequences and make sure that everything you do and every remaining moment you walk on this earth and breath the air of the earth that what you do is consistent with the honor that you should show yourself as a human being, the honor which you hold your family, and the positive role that you want to play in the world.

Given the way that you have lived over the last 11 years and given what you told me about yourself and what you want to do, given the support that you have of your family and the careful planning that you have done with the social worker and the work that you will be doing with probation, I know that you can succeed. So believe in your heart that you can succeed as well and live that success every single day. Make sure that you are making progress every day toward the goals that you have set for yourself.

I see that you are loved very much by for family.

That makes you rich. Treasure that and treasurer your freedom. The keys to your freedom is very much in your own hands because they depend on what you do. The love of your family is in your hands as well. So they love you unconditionally, reciprocate that love and encourage them in every way and they will encourage you in every way. I wish you and your family continued strength and success together.

You'll have the guidance and support of the Probation Department in reestablishing your day-to-day life. Officer Calderon and her colleagues are in the job that they do because they are genuinely committed to helping people succeed in changing their lives. Being under supervision isn't easy, but know that they are not there to hassle you. They are there to help you grow and help you live in a way that is right and is as successful as it can be. Please take the supervision requirement in that spirit.

I have to caution you that you have to comply strictly with all of the conditions that I have set for your supervised release. If you are brought back before me for violating any of those conditions, I may send you back to prison. So please don't ever put me in a position of having to make that choice.

I know that you can succeed. And as good as it is to see you today, I hope I never see you again because if I never see you again that means you are succeeding. I would ask that specifically promise your family face-to-face and promise

yourself that you'll never again do anything that even can put you at risk of going back to prison. You know how precious freedom is and you know how precious you are to them.

I thank you all for listening. I also thank counsel for their work, for their thoughtful advocacy on these difficult legal issues and on the the fundamental question of justice here. So thank you for helping me reach the right decision.

I will direct that an amended copy of the presentence report be prepared for the Sentencing Commission. All other copies of the report must remain confidential. If an appeal is taken, counsel on appeal is to be permitted access to the report. Of course the corrected copy will go to counsel as well.

Now, you can be seated.

I have a couple of practical questions and I will have sign an order here.

Practical question: Are there clothes and shoes and a warm coat for Mr. Scott?

UNIDENTIFIED PERSON: No.

MS. WILLIS: We do have a clothing closet in our office. We do sometimes get clothes for that. So we can check what sizes we have and coordinate with the family.

THE COURT: Ms. Calderon.

OFFICER CALDERON: Your Honor, we also have a closet

as well and we can find something.

THE COURT: We have to make Mr. Scott is physically equipped to go outside assuming there are no other impediments.

Now, the Marshal service will be taking Mr. Scott back for processing and will have to check to make sure there are no warrants or anything else that would impede release.

So, counsel, the marshals will inform the family of what to expect and how it is you can meet up again. So I thank you all in advance for doing that.

Ms. Ng, would you print out the order that I have to sign.

I have signed an order that says, Pursuant the sentence of time-served imposed today, the defendant, Gerald Scott, is released from the custody of the U.S. Marshal Service.

I think that is the right way to do it even though he is in BOP custody now and out. It says time-served and I hope that will suffice.

I would ask the marshals to let Mr. Scott acknowledge his family as he leaves the courtroom and I thank you for making that accommodation as well.

So everyone be well, happy new year, and do good in the world.

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